

Message Text

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ACTION AF-06

INFO OCT-01 ISO-00 L-03 H-02 DHA-02 PA-01 PRS-01 USIA-06

CIAE-00 INR-07 NSAE-00 EB-07 COME-00 SIL-01 LAB-04

JUSE-00 /041 W

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R 241029Z OCT 75

FM AMEMBASSY PRETORIA

TO SECSTATE WASHDC 2094

INFO AMCONSUL CAPE TOWN

AMCONSUL DURBAN

AMCONSUL JOHANNESBURG

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E.O. 11652: N/A

TAGS: EINV, LAB, SF

SUBJECT: FOREIGN COURTS EVIDENCE ACT

REF: STATE 242103

1. THERE SEEM TO US TO BE TWO SEPARATE AND DISTINCT QUESTIONS INVOLVED IN THE GENERAL QUESTION (PARA 7 REFTTEL) OF WHETHER US FIRMS WOULD BE SUBJECT TO PENALTIES UNDER FOREIGN COURTS EVIDENCE ACT IF THEY PROVIDED INFORMATION REQUESTED BY CONGRESS.

2. FIRST QUESTION IS WHETHER SUCH FIRMS MUST REQUEST PERMISSION OF MINISTER BEFORE SUPPLYING INFORMATION TO CONGRESS OR TO PARENT FOR TRANSMISSION TO CONGRESS. THIS TURNS ON WHAT IS AN "ORDER, DIRECTION OR LETTERS OF REQUEST". IF WE ASK FOR A CLARIFICATION OF THIS PHRASE WE SUSPECT THAT IT WILL BE GIVEN THE BROADEST POSSIBLE MEANING, AT LEAST BROAD ENOUGH TO INCLUDE REQUESTS FROM US CONGRESS, EVEN IF REPLY IS VOLUNTARY. (OF COURSE, NO PERMISSION NEED BE ASKED WHERE MINISTER HAS GRANTED BLANKET PERMISSION FOR SPECIFIC TYPES OF INFORMATION TO BE FURNISHED FOR SPECIFIC PURPOSES. EXAMPLE IS NOTICE R532 GAZETTE 4621 OF 3/21/75, BY WHICH MINISTER GRANTS EXPORTERS PERMISSION

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TO GIVE OFFICIALS OF IMPORTING COUNTRY SUCH INFORMATION AS IS

NEEDED FOR DETERMINING CUSTOMS DUTIES.)

3. SECOND QUESTION IS WHETHER OR NOT PERMISSION WOULD BE GRANTED IF REQUESTED FOR CASES INVOLVING EMPLOYMENT PRACTICES OF SA SUBSIDIARIES OF US FIRMS. THIS SEEMS AN OPEN QUESTION AND WE DOUBT THAT SAG HAS FORMULATED CLEAR POLICY. IF WE GO TO SAG FOR CLARIFICATION WE SUSPECT THAT WE WILL EITHER NOT GET CLEAR ANSWER ("WE CANNOT ANSWER BY HYPOTHETICAL QUESTION") OR THAT ANSWER WILL BE THE MOST RESTRICTIVE POSSIBLE.

4. IN VIEW OF FOREGOING, EMBASSY IS INCLINED TO BELIEVE IT MAY BE BEST TO LIVE WITH PRESENT FOGGY SITUATION RATHER THAN TO PRESS SAG FOR ANSWERS. SAG OFFICIALS WOULD BE UNIMPRESSED BY ARGUMENTATION IN PARA 6 REFTEL THAT US FIRMS COULD BE PUT IN UNPLEASANT POSITION BETWEEN CONFLICTING US AND SA LAWS, FOR THAT IS SPECIFICALLY WHAT IS INTENDED BY AMENDMENT TO FOREIGN COURTS EVIDENCE ACT. ANY IMPLIED THREAT OF CONGRESSIONAL SUBPOENA WOULD SIMPLY CONFIRM APPLICABILITY OF SA LAW TO REQUESTS FOR INFORMATION, SINCE SUCH REQUESTS WOULD OBVIOUSLY NOT BE VOLUNTARY. SA SUBSIDIARIES OF US FIRMS WOULD THEREFORE NOT BE FREE TO PROVIDE ANSWERS TO THEIR AMERICAN PARENTS WITHOUT MINISTER'S PERMISSION.

5. ACCORDINGLY IT APPEARS THAT CHANCE OF OBTAINING INFORMATION MAY BE BETTER IF FURTHER CLARIFICATION (WHICH WOULD PROBABLY BE MORE RESTRICTIVE) IS NOT SOUGHT AND REQUESTS FOR INFORMATION ARE KEPT VOLUNTARY. NEVERTHELESS IF DEPT. BELIEVES IT WOULD BE BETTER TO SEEK CLARIFICATION SIMPLY TO KEEP THE RECORD STRAIGHT, EMBASSY WILL BROACH THE ISSUE WITH APPROPRIATE SAG OFFICIALS.
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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: INTELLIGENCE COLLECTION, LAW, CENTRAL LEGISLATURE, COURTS, BUSINESS FIRMS
Control Number: n/a
Copy: SINGLE
Draft Date: 24 OCT 1975
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: buchant0
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1975PRETOR04062
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D750370-1017
From: PRETORIA
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1975/newtext/t19751019/aaaaarbh.tel
Line Count: 90
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION AF
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 2
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 75 STATE 242103
Review Action: RELEASED, APPROVED
Review Authority: buchant0
Review Comment: n/a
Review Content Flags:
Review Date: 28 AUG 2003
Review Event:
Review Exemptions: n/a
Review History: RELEASED <28 AUG 2003 by ShawDG>; APPROVED <17 DEC 2003 by buchant0>
Review Markings:

Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
06 JUL 2006

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: FOREIGN COURTS EVIDENCE ACT
TAGS: EINV, ELAB, SF
To: STATE
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 06 JUL 2006